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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JEANNE MANARITE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does promotion of unlawful activity under the "money laundering statute" (18 U.S.C. § 1956(a)(3)(A)) require proof that a defendant "plowed back" or reinvested proceeds, as the Seventh and Third Circuits have held, or can a defendant be convicted absent such proof, as the Ninth Circuit held in this case?

2. Is a defendant who is induced to violate the law by an unwitting middleman, himself entrapped by the Government, entitled to a jury instruction on derivative entrapment, as most United States courts of appeal have held, or can such a jury instruction be denied, as the Ninth Circuit held in this case?

3. Does an undercover government agent who encourages and instructs a defendant on how to take government property consent to the taking, so that, despite her mens rea, the defendant cannot violate 18 U.S.C. § 2315, making it unlawful to receive stolen goods?

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Jeanne Manarite respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on January 6, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 44 F.3d 1407 (9th Cir.

1995), and is set out as Appendix A. The trial court's judgment is unreported, but appears as Appendix B.[1]

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on January 6, 1995. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition is based, in part, on the following statutes:

Section 1956 of Title 18 of the United States Code, which provides in relevant part--

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or

---

[1]The parties to the appeal before the Ninth Circuit were Jeanne Manarite and Samuel Manarite, as appellants, and the United States, as respondent.

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

* * * *

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

> (C) to avoid a transaction reporting requirement under State or Federal law,
>
> conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

Section 2315 of Title 18 of the United States Code, which provides in relevant part--

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, security, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken
>
> * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

A superseding indictment charged petitioner Jeanne Manarite, and co-defendants Samuel Manarite, Robert Manarite, and Sandra Bonham, with eight counts stemming from three separate schemes orchestrated by the Federal Bureau of Investigations ("FBI") as part of an undercover sting operation in Las Vegas, Nevada. The superseding indictment was brought in United States District Court for the District of Nevada, pursuant to 18 U.S.C. § 3231.

Count One, charging conspiracy, encompassed all three schemes. The first scheme, charged in Counts Two and Three, involved a chip cashing plan, wherein government agents gave the defendants casino chips they represented were skimmed from a blackjack table and had the defendants cash them. The Government's cooperating witness, Richard McLaughlin testified that he told the defendants that a blackjack dealer he knew at the Maxim Hotel and Casino needed someone to cash casino chips he had skimmed. McLaughlin further testified that he gave Jeanne Manarite $4,000 in chips, which he had her cash. The parties repeated this type of exchange on a few occasions.

The second scheme, a credit scheme encompassing Counts Four and Five, involved a plan to obtain credit from the Maxim Hotel and Casino and by submitting a fraudulent credit application to obtain $5,000. McLaughlin testified

that Samuel Manarite and Jeanne Manarite suggested that Sandra Bonham, an acquaintance, use false identification to open a line of credit. Bonham was introduced to undercover FBI agent Bill Matthews, who extended Bonham the line of credit. Bonham converted the credit into chips, gambled a bit, and returned to the hotel room with $4,802 in chips.

Counts Six, Seven, and Eight stem from a scheme in which government agents provided Jeanne Manarite and other defendants access to a boat at Marina Del Rey, California. The boat and property were purportedly owned by a drug dealer but were actually owned by the Government. Agent Matthews encouraged the defendants to burglarize the boat and, in great detail, he instructed them how best to board the vessel and where to find the valuables. The defendants took money, jewelry, and casino chips from the boat and transported these items to Nevada.

Jeanne Manarite and her co-defendants were tried. Following the Government's case, Jeanne Manarite moved for a judgment of acquittal, but her motion was denied. Jeanne Manarite requested a jury instruction on entrapment, but the district court refused. The jury convicted the defendants on Counts One, Two, Three, Five, Six , Seven, and Eight of the superseding indictment. The defendants were found not guilty on Counts Four and Five, relating to the credit scheme. Jeanne Manarite again moved for judgment of acquittal and again the court denied the motion.

Jeanne Manarite appealed her conviction on the grounds that there was insufficient evidence to support a jury finding her guilty of money laundering and aiding and

abetting, of transportation and receipt of stolen property, and of conspiracy. Jeanne Manarite further asserted that the district court erred when it refused to submit a jury instruction on entrapment, when it denied her motion to sever, and when it sentenced her. The United States Court of Appeals for the Ninth Circuit reversed Jeanne Manarite's conviction for conspiracy, but affirmed the convictions on the other counts. The appellate court remanded the case for resentencing to enable the district court to make a statement of reasons for its decisions as required by 18 U.S.C. § 3553(c)(1).

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH AND FOURTH CIRCUITS HOLDING THAT FINANCIAL TRANSACTIONS DO NOT PROMOTE UNLAWFUL ACTIVITY UNLESS PROCEEDS ARE "PLOWED BACK" INTO THE UNLAWFUL ACTIVITY.

Title 18 U.S.C. § 1956(a)(3)(A) requires the Government to prove that a defendant intended to "promote the carrying on of a specified unlawful activity." The United States courts of appeals are in conflict over the meaning of the term "promote." In this case, the Ninth Circuit rejected Jeanne Manarite's argument that a conviction under the promotion prong of the money laundering statutes requires proof that the defendant "plowed back" or reinvested proceeds into the specified unlawful activity. The

court stated, "A rational jury could conclude that the Manarites cashed chips with the intent to promote the chip-skimming scheme. 'Plowing back' of the gains into the enterprise is not necessary." See Appendix A at A-16. This decision conflicts directly with decisions in the Seventh and Fourth Circuits on the same point. The Court should resolve this conflict among the United States courts of appeals.

The decision below follows earlier Ninth Circuit case law. In United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), a state senator was convicted of money laundering for accepting a bribe in the form of a check, and then depositing that check into his personal banking account. On appeal, the defendant argued that depositing the check did not "promote" unlawful activity because the unlawful activity -- bribery -- was completed upon receipt of the check. The court rejected this argument, concluding that sufficient evidence supported the money laundering conviction because the defendant "could not have made use of the funds without depositing the check" and the deposit made the bribe look more like "a legitimate honorarium." Id. at 1076.

Montoya has been followed in the Third Circuit. See United States v. Paramo, 998 F.2d 1212, 1218 (3d Cir. 1993) (defendant can violate 18 U.S.C. § 1956(a)(1)(A)(i) even if he does not plow back or reinvest the proceeds into unlawful activity), cert. denied, 114 S. Ct. 1076 (1994). In Paramo, the defendant was involved in a scheme to embezzle refund checks from the Internal Revenue Service by accepting checks made to fictional payees and forwarding them to his brother, who deposited the checks. The defendant used his share of the proceeds to pay bills and other personal expenses. The appellate court, finding that "a defendant can engage in financial transactions that promote

not only ongoing or future unlawful activity, but also prior unlawful activity," held:

> The embezzled checks would have been worthless unless cashed at a bank or otherwise exchanged. . . [Thus,] the jury could have found that the cashing of each check contributed to the growth and prosperity of each preceding mail fraud by creating value out of an otherwise unremunerative enterprise.

Judge Rosenn filed a stirring dissent to the Paramo majority decision, noting that it "seems fundamental that one can only contribute to the growth of a venture that is ongoing or to be conducted in the future" and advocating the approach taken in Jackson, infra, that "a person promotes a scheme only when he or she ploughs back the proceeds thereof to purchase implements, such as beepers, to further the illegal enterprise." Id. at 1223.

The Seventh and Fourth Circuits, in disagreement with the Ninth and Third, hold that a violation of the money laundering statute for promotion of an unlawful activity requires that proceeds be plowed back into the illegal enterprise. This interpretation of "promotion" reflects a better-reasoned approach.

United States v. Jackson, 935 F.2d 832, 842 (7th Cir. 1991), held that "[18 U.S.C.] § 1956(a)(1)(A)... [is] aimed at... the practice of plowing back proceeds of specified unlawful activity to promote that activity." In Jackson, a reverend deposited proceeds of drug sales into a general church bank account on which he later wrote checks to pay rent and to purchase beepers, cars, mobile telephones and other personal items. He was convicted on several counts of money laundering. The appellate court reversed the

convictions premised on the payment of rent and the purchase of mobile telephones. The court explained that the evidence demonstrated that the defendant used beepers in his drug activities and so the purchase of the beepers violated § 1956(a)(1)(A)(i). It continued:

> We are, however, unable to view the mobile phone purchases that comprise the remainder of count 3, the rental payments alleged in count 4, or the checks written to cash charged in count 5 as intended to promote the continued operations of Davis' continuing criminal enterprise under § 1956(a)(1)(A)(i). The government did not prove that the cellular phones played the same role --- or indeed, any role -- in Davis' drug operations as the beepers. Likewise the rental payments and the checks written to cash; certainly these expenditures maintained Davis' lifestyle, but more than that is needed to establish that they promoted his drug activities.

In United States v. Heaps, 39 F.3d 479, 486 (4th Cir. 1994), the Fourth Circuit expressly disavowed the approached taken by the Ninth and Third Circuits. The Heaps defendant was convicted of money laundering for using drug proceeds to purchase two money orders. The appellate court found that the prosecution failed to show the funds were plowed back into the unlawful enterprise, and it reversed the conviction. The court explained:

> The only evidence as to what was done with the money after it was sent was that it was put in a box in a drawer. . . . There was no evidence that the money acquired through the payment was itself used to promote an unlawful activity . . . . [T]he Government failed to carry its burden in proving that the defendant intends to promote unlawful activity within the meaning of the statute.

Id. at 486. Heaps further stated:

> To the extent that our holding conflicts with holdings by the Third and Ninth Circuits, see Montoya and Paramo, supra, we must respectfully disagree that the mere receipt of a money transfer and the subsequent placement of cash in a box can, of itself, constitute money laundering under the statute.

The ever-increasing use of the money laundering statutes against defendants who complete any type of financial transaction coupled with the spread of gaming across the county, make this issue of the proper scope of 18 U.S.C. § 1956 of vital importance. There can be no doubt that similar sting operations will continue and prosecutions based on similar facts will appear with greater frequency. This Court should issue a writ of certiorari in this case, resolve the split in the circuits and make clear that, under the money laundering statute, a defendant can only promote unlawful activity by reinvesting proceeds into the activity. Only by so acting can this Court prevent the use of 18 U.S.C. § 1956 as a prohibition on money spending, instead of money laundering. See Jackson, 935 F.2d at 842 (recognizing danger of "[t]he potential overbreadth of the statute, and the risk that juries will confuse money laundering with money spending...")

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS HOLDING THAT ENTRAPMENT CAN BE DERIVATIVE.

Unlike most other circuits, the Ninth Circuit categorically rejects the theory of derivative entrapment. In the instant case, the court noted, "If any inducement occurred, it was Samuel Manarite, not Jeanne, who was induced," and stated, "This Circuit, however, does not recognize the theory of 'derivative entrapment'." See Appendix at A-19. The court cited United States v. Bonanno, 852 F.2d 434, 439 (9th Cir. 1988) ("Bonanno is not entitled to any benefit from [government agent] Terra's alleged inducement of [co-defendant] Gatto. This circuit does not recognize the theory of derivative entrapment."), cert. denied 4882 U.S. 1016 (1989), and United States v. Emmert, 829 F.2d 805, 808 (9th Cir. 1987), which rejected the "conduit" theory whereby a defendant can establish entrapment if he shows that a private middleman was a mere conduit for government inducement. Instead, Emmert held, "The entrapment defense is only available to defendants who were directly induced by government agents. . . . Inducement by a private party is not entrapment." Id. at 808. The Ninth Circuit's rejection of the derivative entrapment theory is in direct conflict with its acceptance by most other circuits.

In United States v. Hollingsworth, 27 F.3d 1196, 1204 (7th Cir. 1994), the Seventh Circuit adopted the theory of derivative entrapment, stating:

> Perhaps the most accurate statement of the current law is that while there is no defense of either private entrapment or vicarious entrapment, there is a defense of derivative entrapment: when a private individual, himself entrapped, acts as agent or conduit for governmental efforts at entrapment, the government as principal is bound.

Hollingsworth involved a defendant, Pickard, who was entrapped into violating money-laundering laws and who derivatively, though unknowingly, entrapped co-defendant Hollingsworth by convincing him to travel from Indianapolis to St. Louis with $30,000 provided by a government agent. The court concluded, "Just as Pickard was entrapped by Agent Rothrock, so was Hollingsworth, even if on some occasions Rothrock was as it were speaking to Hollingsworth through Pickard rather than speaking to Hollingsworth directly." Id. at 1204. It continued:

> Rothrock did not suggest, but he did induce, the association of Hollingsworth with Pickard in the scheme that Rothrock had hatched; and that we think is enough to make Pickard Rothrock's agent in entrapping Hollingsworth. To acquit Pickard but convict Hollingsworth would produce the absurdity of acquitting the principal while sending the agent to prison for 18 months even though the principal had rendered no assistance to the government, the agent did not have a longer criminal record. . . , and no other circumstances authorizing heavier punishment of the lesser criminal was present either.

The Second Circuit has also unequivocally endorsed the theory of derivative entrapment. United States v. Valencia, 645 F.2d 1158, 1168 (2d Cir. 1980), held, "If a

person is brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which could amount to inducement, then that person should be able to avail himself of the defense of entrapment just as may the person who receives the inducement directly." (Emphasis added.) See also United States v. Pilarinos, 864 F.2d 253, 256 (2d Cir. 1988) ("A defendant is entitled to a derivative entrapment defense, therefore, when 'the government's inducement was directly communicated to the person seeking the entrapment charge' by an unwitting middleman.").

Likewise, the District of Columbia Circuit endorsed the derivative entrapment theory in Johnson v. United States, 317 F.2d 127 (D.C. Cir. 1963). Johnson dealt with "the furnishing by the officer of Government money, itself a persuasive factor, to an intermediary acting for the officer in carrying out the transaction, with a 'reward' to the accused as part of its fruit." Id. at 128. The court concluded:

> Inducement of course may take different forms. . . . It is of course inducement by an official which invokes the doctrine. The entrapment defense does not extend to inducement by a private citizen; yet it has found great application to cases where the officer acts through a private citizen, as in the case at bar.

Id.

The Eighth Circuit has not reached the issue, but it has implicitly approved the theory of derivative entrapment. In United States v. Hodges, 936 F.2d 371, 372 (8th Cir. 1991), the court noted:

> The usual entrapment situation involves direct contact between a government agent and a prospective defendant. The go-between in this case, Bell, was a private citizen. Hodges does not contend, and the evidence does not show, that he had any direct contact with the undercover officers. However, courts have also recognized that, under certain circumstances, an unknowing middleman (such as Bell) can satisfy the element of governmental inducement in another's entrapment defense.

(Citations omitted.) See also United States v. Pardue, 983 F.2d 843, 847 (8th Cir., 1993) ("we need not address the difficult issue of private citizen middle-man derivative entrapment raised in this case."), cert. denied, 113 S.Ct. 3043 (1993).

A majority of circuits recognize the defense of derivative entrapment, at least in certain situations. Nevertheless, the Ninth Circuit obstinately continues to reject the theory under any circumstance. This Court should issue a writ of certiorari to reconcile the split in the circuits on this issue, and it should make clear that a defense of derivative entrapment is available in the instant case. As one author put it:

> Courts must recognize that government responsibility for inducing persons not otherwise disposed to commit criminal acts is not attenuated by the fact that the offense is committed upon the immediate prompting of an unsuspecting intermediary. If the government is vulnerable to entrapment charges for inducing the foreseeable offenses of third parties not predisposed to crime, it will be compelled to review

and minimize the ways in which middlemen might detract from efficient law enforcement.

Note, Entrapment Through Unsuspecting Middlemen, 95 Harv. L. Rev. 1122, 1140 (1982).

III.

WHETHER PROPERTY THAT THE GOVERNMENT AUTHORIZES THE ACCUSED TO TAKE IS PROPERLY CHARACTERIZED AS STOLEN IS AN IMPORTANT QUESTION OF FEDERAL LAW IN NEED OF CLARIFICATION

Title 18 U.S.C. § 2315 makes it unlawful to receive goods, wares, or merchandise "knowing the same to have been stolen, unlawfully converted, or taken." Defendants were convicted of interstate transportation and receipt or possession of stolen property, stemming from the removal and transportation of property from a boat in Marina Del Rey, California to Nevada. The Government owned the boat and the property on it. The evidence also demonstrates, and the appellate court found, that government agent Matthews aided and encouraged the taking of the property. Nevertheless, the Ninth Circuit rejected Jeanne Manarite's argument that the explicit instructions and encouragement constituted authority or consent to the taking of the property, explaining that "the FBI agent did not give them permission to take property from the 'drug dealer's' boat or suggest that the drug dealer would permit it." See Appendix A at A-18.

An essential of 18 U.S.C. § 2315 is that the property in question actually be stolen. See United States v. Albuquerque, 538 F.2d 277, 278 (9th Cir. 1976) (to sustain

a conviction of interstate transportation of a stolen vehicle, it must be shown beyond a reasonable doubt that the automobile was stolen). To be considered stolen, the property must be taken without the consent of its owner or rightful possessor. See United States v. Burbank, 848 F.2d 453 (4th Cir. 1988) (One shareholder consented to transactions conducted by the other so the property received could not be characterized as stolen, and the defendant could not be convicted of transporting stolen property in interstate commerce.).

Property, taken with the consent and the encouragement of its owner, cannot be characterized as stolen, regardless of the accused's mens rea because factual or legal impossibility is a complete defense to the crime when circumstances unknown to the actor prevent the commission of an offense, or the defendant's actions, if fully performed, would not constitute a crime. See United States v. Johnson, 543 F.2d 55, 58-59 (8th Cir. 1976) (Factual impossibility is a defense "where circumstances unknown to the actor prevent his commission of an offense," and legal impossibility is a defense "where a defendant's actions, if fully performed, would not constitute a crime.").

United States v. Dove, 629 F.2d 325 (4th Cir. 1980), makes the point that government controlled property cannot support a conviction on a stolen property charge. In Dove, the government took possession of stolen property and sold it to the defendant who believed it was stolen. The court held that once the government agent recovered the property it lost its stolen character and no conviction could be sustained regardless of the defendant's intent when he received the property. See Id. at 328-29. The instant case is even more compelling than Dove. Since the property was

never stolen and government agents consented to its taking, the conviction under 18 U.S.C. § 2315 should be reversed.

As the Ninth Circuit acknowledges, there is no law on point in this area, and both Jeanne Manarite and the Government have had to analogize from arguably similar cases. The appellate court noted:

> Nonetheless, the law cited by neither side is on point. The Manarites rely on cases which involved stolen property recovered by the police and then used in sting operations to apprehend those who buy and sell stolen property. ... The government cites authorities for various definitions of "stolen," all of which involve taking without the owner's consent. These cases miss the point.

The dearth of law on the nature of stolen property and the consequences of an undercover agent's invitation to take government property make the Court's guidance in this area critical. The Court issue a writ of certiorari and reverse Jeanne Manarite's conviction for receipt of stolen property.

CONCLUSION

This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's decision conflicts with the well-reasoned decisions of other circuits holding that financial transactions do not promote unlawful activity unless proceeds are "plowed back" into the unlawful activity. The Ninth Circuit's decision also conflicts with the decisions of other circuits holding that entrapment can be derivative. Finally, the Ninth Circuit's decision misconstrues the nature of stolen

property under 18 U.S.C. § 2315 by affirming petitioner's conviction despite the undercover agent's consent to the taking of the government's property.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
Samuel Manarite and Jeanne Manarite,
Defendants-Appellants.

Nos. 93-10527, 93-10528

D.C. Nos.
CR-92-00296-1-LDG
CR-92-00296-2-LDG

Argued and Submitted
October 5, 1994--San Francisco, California

Filed January 6, 1995
Amended March 15, 1995

Before: Joseph T. Sneed, Harry Pregerson, and Charles Wiggins, Circuit Judges

SNEED, Circuit Judge:

Samuel and Jeanne Manarite appeal their convictions for conspiracy, money laundering, and interstate transportation and

receipt of stolen property.[1] They contend that the trial court erred in (1) denying their motions for judgment of acquittal, (2) refusing to instruct the jury on entrapment, (3) denying Jeanne Manarite's motion to sever, (4) admitting evidence of Samuel Manarite's parole status, and (5) assessing their sentences. We reverse the Manarites' conspiracy convictions, vacate their sentences, and remand the case for resentencing.

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[1]The counts of the indictment were as follows:

Count 1: Conspiracy in violation of 18 U.S.C. § 371 to commit (1) money laundering in violation of 18 U.S.C. § 1956(a)(3)(A) & (B) (chip-cashing scheme) and § 1956(a)(1)(B)(i) (chips obtained through credit scam and boat burglary); (2) mail fraud in violation of 18 U.S.C. § 1341 (credit scam); (3) wire fraud in violation of 18 U.S.C. § 1343 (credit scam); (4) interstate transportation of stolen property in violation of 18 U.S.C. § 2314 (burglary proceeds); and (5) receipt of stolen property in violation of 18 U.S.C. § 2315 (burglary proceeds).

Counts 2 and 3: Money laundering in violation of 18 U.S.C. § 1956(a)(3)(A) & (B) and aiding and abetting in violation of 18 U.S.C. § 2 (chip-cashing scheme).

Count 4: Wire fraud in violation of 18 U.S.C. § 1343 and aiding and abetting in violation of 18 U.S.C. § 2 (credit scam).

Count 5: Money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and aiding and abetting in violation of 18 U.S.C. § 2 (cashing chips obtained through credit scam).

Count 6: Interstate transportation of stolen property in violation of 18 U.S.C. § 2314 and aiding and abetting in violation of 18 U.S.C. § 2 (burglary proceeds).

Count 7: Receipt of stolen property in violation of 18 U.S.C. § 2315 and aiding and abetting in violation of 18 U.S.C. § 2 (burglary proceeds).

Count 8: Money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and aiding and abetting in violation of 18 U.S.C. § 2 (cashing chips obtained in boat burglary).

I.

FACTS AND PROCEEDINGS BELOW

This case involves three criminal schemes that developed as a result of a sting operation conducted by the Federal Bureau of Investigation (FBI) in Las Vegas, Nevada, viz., a casino chip-cashing scheme, a casino credit scam, and the burglary of a fictitious drug dealer's boat.

Under the FBI's direction, an informant, Richard McLaughlin, set out to "get close" to Samuel Manarite. Manarite had an extensive criminal record and was reputed to have ties to the Mafia. They first met in December 1991, when McLaughlin approached Manarite to sell him some jewelry. Though Manarite had intermittent suspicions that McLaughlin was a cop, the two became acquaintances.

Manarite suggested that they could "earn some money together." McLaughlin told Manarite that he had a contact at the Maxim casino, "Bill Peterson," who was in fact FBI Special Agent William Matthews. Over the next few weeks, McLaughlin and Manarite discussed possible ways to make money at the casino, in the course of which McLaughlin often wore a wire.

A. The Chip-Cashing Scheme

The first result of these meetings was a chip-cashing scheme, which unfolded in this manner. Sometime during March 1992, McLaughlin met with Manarite and his wife, Jeanne. McLaughlin told them that "Peterson" had a dealer who was skimming casino chips off the blackjack tables and needed someone to cash them. The Manarites proposed various ways to cash the chips; Jeanne suggested taking them to the cage in small amounts. Eventually, it was agreed that the Manarites and McLaughlin would cash the chips. During March and April, $17,925 worth of casino chips were cashed. Jeanne and their son, Robert, did much of the work because Samuel was on parole, and Jeanne didn't want to "risk"

him. At the end of April, "Peterson" told Samuel Manarite that the dealer had become nervous and had stopped skimming chips.

B. The Credit Scam

The sting operation now entered its second phase. In May, "Peterson" and McLaughlin met with the Manarites to devise a credit scam. On May 16, as planned, Sandra Bonham, a friend of Robert Manarite, used a fake driver's license and filed a false credit application at the Maxim casino. "Peterson" approved $5,000 credit to Bonham up front. The scam was carried out on a Saturday, to prevent the casino from processing the application until Monday. Bonham took the money in chips, gambled awhile to avoid looking suspicious, and gave $4,800 in chips to the Manarites. Over the next few days, McLaughlin and Samuel Manarite cashed the chips.

C. The Burglary of a Boat

In June, to instigate the third sting operation, "Peterson" approached Samuel Manarite with a burglary scheme. "Peterson" claimed that he laundered money for a drug dealer in California. He said that during his visits, he and the dealer would invariably go out to lunch, leaving the money aboard the dealer's boat. "Peterson" assured Manarite that the boat would be left unattended with the door unlocked, so it would be easy to steal the money. Manarite agreed to arrange the burglary.

McLaughlin and Jeanne and Robert Manarite met in Marina Del Rey, California, on June 9. McLaughlin and Jeanne acted as lookouts while Robert boarded the boat and removed $18,300 worth of cash and casino chips, plus three pieces of jewelry. Of course, the boat and everything on board were actually owned by the FBI. The three drove the proceeds of the burglary back to Las Vegas. The sting operations, so far as we know, were finished.

Samuel and Jeanne Manarite were indicted on January 26, 1993. Both were charged with conspiracy, money laundering, wire fraud, interstate transportation and receipt of stolen property, and aiding and abetting. The Manarites were tried together. At the close of the government's case, both moved for judgment of acquittal under Rule 29(a). Their motions were denied. Jeanne Manarite requested that the judge instruct the jury on entrapment. The judge refused. The jury convicted both defendants of all counts except those related to the credit scam.[2] The defendants moved again for judgment of acquittal under Rule 29(c). The court denied their motion.

[1] The defendants timely appeal. This court has jurisdiction under 28 U.S.C. §1291. We hold that the Manarites' convictions for conspiracy must be reversed. We affirm the remainder of their convictions.

II.

DISCUSSION

A. The Conspiracy Convictions

The Manarites contend they were entitled to a judgment of acquittal because their convictions were based on insufficient evidence. We agree with respect to the conspiracy convictions.

This court uses the same standard of review for denial of a motion for judgment of acquittal as it does for a challenge to the sufficiency of the evidence. *United States v. Shirley*, 884 F.2d 1130, 1134 (9th Cir. 1989). We must review the evidence in the light most favorable to the government to determine whether " *'any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). The

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[2]The Manarites were acquitted on Counts 4 and 5.

evidence is insufficient to support a conviction for the substantive crime of either mail or wire fraud. As will appear subsequently, the Manarites could not be convicted of *conspiracy* to commit mail or wire fraud, either. The conspiracy charge did include several *other* crimes as objects of the conspiracy, any one of which would have been sufficient to support the conspiracy convictions. The jury, however, used a general verdict form, which does not reveal which object or objects the jurors relied on to find the Manarites guilty of conspiracy. Because the jurors could have relied exclusively on the legally insufficient objects (mail or wire fraud), we are obliged to reverse the Manarites' conspiracy convictions.

1. Insufficiency of the Mail Fraud[3] and Wire Fraud[4] Objects.

[2] The Manarites argue that the evidence was insufficient to support their convictions for conspiracy to commit mail and wire fraud. In particular, they maintain that the telephone calls and mailings resulting from the credit scam at the Maxim casino were not in furtherance of the scheme. We agree.

We have interpreted the mail fraud statute to require proof that the accused (1) participated in a scheme or artifice to defraud, and (2) caused a use of the mails, (3) for the purpose of executing the scheme. *United States v. Brutzman,* 731 F.2d 1449, 1454 (9th Cir. 1984).[5] The issue is whether the Manarites' actions in

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[3]Object (2) of Count 1 (Conspiracy) of the indictments.

[4]Object (3) of Count 1 (Conspiracy) of the indictments.

[5]The mail fraud and wire fraud statutes "share identical language" regarding the scheme requirements, so the wire fraud statute is read in light of the case law on mail fraud. U.S. v. *Louderman,* 576 F.2d 1383, 1387 n.3 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978). Both provide that "w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises [mails or causes to be mailed]/[transmits or causes to be transmitted] for the

executing the fraud on a weekend, in order to ensure that the casino would be unable to process the false credit application until Monday, caused a use of the mails for the purpose of executing the scheme.

The Manarites rely mainly on *United States v. Maze*, 414 U.S. 395 (1974). There, the accused traveled to California with his roommate's credit card and charged motel rooms and meals. He was indicted for mail fraud, based on the motels' mailing sales slips to the bank that had issued the card, which then mailed a bill to the roommate. The government argued that "the delay in this mailing would enable the [defendant] to continue purchasing goods and services for an appreciable period of time." *Id.* at 397.

The Court, however, found that the mailings did not further Maze's scheme. Maze's scheme had already been completed; it "reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." *Id.* at 402. The mailings were merely "directed to the end of adjusting accounts between the motel proprietor, the Louisville bank, and [the roommate], all of whom had . . . been the victims" of the scheme. *Id.*

[3] Here, the government argues that, unlike the defendant in *Maze*, the Manarites deliberately structured the credit scam to delay the inevitable mailing or phone call.[6] This is true;

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purpose of executing such scheme or artifice ... shall be fined ... or imprisoned ...." 18 U.S.C.§1341; 18 U.S.C.§1343.

[6]In support of its position, the government cites two pre-Maze cases, *United States v. Kelem*, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1970) (Finding mail fraud where defendants undertook scheme to sell airline tickets purchased with credit cards, never paying the bills), and *Suhl v. United States*, 390 F.2d 547 (9th Cir.), *cert. denied*, 391 U.S. 964 (1968) (holding that check-kiting scheme constituted mail fraud where worthless checks were passed between defendants' bank accounts in separate cities). But their validity is suspect in light of *Maze*, which disapproved *Kelem* in particular. *See* 414 U.S. at 398

however, their scheme was complete when they cashed the chips. The fact that the *delay* enhanced the Manarites' ability to escape detection is insufficient. Moreover, their chance of avoiding detection would have been enhanced even more had there been *no* use of the mails or telephone at all.

The government points out that"[lletters mailed after the defrauders have received their money may be in furtherance of the fraudulent scheme." *Brutzman,* 731 F.2d at 1454. The Supreme Court has identified two such scenarios: the "lulling scheme" and the "ongoing scheme." The Manarites' case, however, does not fall into either category.

In a lulling scheme, subsequent mailings are "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely." *Maze,* 414 U.S. at 403 (distinguishing *United States v. Sampson,* 371 U.S. 75 (1962)); *see, e.g., Sampson,* 371 U.S. 75; *Brutzman,* 731 F.2d 1449; *United States v. Jones,* 712 F.2d 1316 (9th Cir.), *cert. denied,* 464 U.S. 986 (1983); *United States v. Miller,* 676 F.2d 359 (9th Cir.), *cert. denied,* 459 U.S. 856 (1982). "In such a scheme, the mailing reassures the victim that all is well, discouraging him from investigating and uncovering the fraud." *Jones,* 712 F.2d at 1321. Lulling schemes can include mailings sent by someone other than the defrauder, even routine mailings in the ordinary course of business. *See, e.g., Id.* at 1320 (notices of lease payments made by nearly bankrupt corporation sent to investors in fraudulent sale/leaseback transactions); *Brutzman,* 731 F.2d at 1454 (defrauded investors' letters demanding refunds, which were promised as part of the scheme). Such mailings, too, have the effect of reassuring the victim that all is well.

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n.2. Furthermore, unlike this case, both *Kelem* and *Suhl* involved ongoing schemes that depended upon the delay for their continued success. *See Kelem,* 416 F.2d at 348: *Suhl.* 390 F.2d at 549-50.

[4] The Court in *Maze* distinguished the defendant's situation from a lulling scheme, finding that the mailings between the motels, the bank, and the roommate made it *more* likely that Maze's fraud would be detected. 414 U.S. at 403. Maze "probably would have preferred to have the invoices misplaced . . . and never mailed at all." *Id.* at 402. The same is true in this case. The prospective mailings and phone calls were clearly not part of any kind of lulling scheme. They would not assure the victim that all is well; rather, they would have exposed the credit scam and increased the likelihood of the Manarites' apprehension. *See Id.* at 403.

[5] It is also true that the use of the mails and telephone in this case would not have furthered an *"ongoing* scheme." In *Schmuck v. United States,* 489 U.S. 705 (1989), the defendant bought used cars, rolled back their odometers, and sold them at inflated prices to car dealers, who in turn sold them to customers. He was convicted of mail fraud based on the dealers' mailing title-application forms to the Wisconsin Department of Transportation on behalf of customers. The Supreme Court upheld this application of the statute. Finding that "the success of Schmuck's venture depended upon his harmonious relations with, and good reputation among, retail dealers," as well as their ability to resell Schmuck's cars, the Court held that "a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title." *Id.* at 711-12.

The Manarites' credit scam was not an ongoing scheme. As in *Maze,* the scheme was completed upon receipt of the $5,000 credit advance and the cashing of the chips. The credit application requested only $5,000. It was a "'one-shot' operation." *Schmuck,* 489 U.S. at 711. The Manarites did not seek to gain the trust of the casino or to facilitate any additional transactions, nor did they need to do so to reap the rewards of the scam.

In sum, the mailings and phone calls in this case simply were not in any way "'incident to an essential part of the scheme.'" *Id.* at 712 (quoting *Pereira v. United States*, 347 U.S. 1, 8 (1954)). Although the evidence shows "that (a) there was a scheme to defraud, (b) [the defendants] were involved, and (c) a mailing occurred," that is not enough to convict the Manarites absent proof that the "mailing was in furtherance of the scheme to defraud." *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977).

2. Defects in the Conspiracy Convictions.

[6] The Manarites were acquitted of the substantive wire fraud count, but were convicted on the conspiracy count, which included as its objects mail and wire fraud. However, as already indicated, the credit scam the Manarites carried out did not constitute mail or wire fraud as a matter of law. Any one of the remaining objects of the conspiracy (money laundering, etc.) alone would have been legally sufficient to support the conspiracy convictions; however, in the Manarites' case, there is no way to know which objects the jury relied on in its decision to convict them of conspiracy. In finding the Manarites guilty of conspiracy, the jury used a general verdict form, which gave no indication of which object or objects formed the basis of their decision.

[7] As indicated earlier, the conspiracy convictions cannot stand. "[I]f the judge instructs the jury that it need find only one of the multiple objects, and the reviewing court holds any of the supporting counts legally insufficient, the conspiracy count also fails." *United States v. DeLuca*, 692 F.2d 1277, 1281 (9th Cir. 1982). The problem "springs from the combined effect of the composite conspiracy count, the one-is-enough jury charge, and the failure of one of the substantive crime counts to charge a crime." *United States v. Carman*, 577 F.2d 556, 568 (9th Cir. 1978).

[8] Under 18 U.S.C. § 371, a single charge of conspiracy can have multiple objects, but each object alleged must constitute

a federal offense.[7] In the Manarites' case, the mail and wire fraud objects alleged in the conspiracy charge were legally insufficient to be federal offenses.[8] Because the Manarites were acquitted of the substantive wire fraud charges, one could argue that the jury likely did not base the conspiracy convictions on mail or wire fraud. Nonetheless, because the jury used a general verdict form, there is no way to be certain. *Carman, 577 F.2d at 566, 568*. It is possible that the jury in this case acquitted the Manarites of the substantive count, yet used mail and wire fraud as the basis of the conspiracy convictions. *See United States v. Guzman, 849* **F.2d** *447, 448* **(9th Cir.** *1988); Carman, 577* **F.2d at** *567.*

That uncertainty is enough to doom the Manarites' conspiracy convictions. Accordingly, we reverse them.[9]

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[7]*United States v. Clay*, 495 F.2d 700 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974). There must be proof of an agreement "to accomplish something that constitutes an offense against the United States," as well as an oven act. *United States v. Lichtenstein*, 610 F.2d 1272 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980); *see also Lubin v. United States*, 313 F.2d 419, 422 (9th Cir. 1963) ("We do not think that the Congress, in enacting the conspiracy statute, intended to make criminal schemes which, if successfully carried out, would not result in the commission of federal substantive offenses.").

[8]Their case is analogous to *United States v. DeLuca*, 692 F.2d 1277 (9th Cir. 1982), in which the defendants were convicted of destruction of a building with an explosive in violation of 18 U.S.C. § 844. There the court held that gasoline fires were not within the meaning of "explosive" and not only reversed the defendants' convictions, but also reversed their convictions under a multiple-object conspiracy charge. The court said "the jury could have focused on [the] legally insufficient object of the conspiracy." *Id.* at 1281; *accord Carman*, 577 F.2d at 568; *United States v. Talkington*, 589 F.2d 415, 417-18 (9th Cir. 1978) (per curiam).

[9]Our reversal of the conspiracy convictions does not undermine the validity of the Manarites' convictions on the *substantive* counts, despite the fact that the jury was given a *Pinkerton* instruction, *see Pinkerton v. United States*, 328 U.S. 640 (1946). We assume, *arguendo*, that our reversal of the conspiracy

B. The Money Laundering Convictions.[10]

1. Specified unlawful activity.

The Manarites argue that, in the chip-cashing scheme, the government failed to prove that the casino chips were represented to be the proceeds of "specified unlawful activity" as required by the statute. The statute defines "specified unlawful activity" as including offenses listed in § 1961(1). 18 U.S.C. § 1956(c)(7)(A). These offenses include "any act . . . involving . . . gambling . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A). The government based its case on two Nevada gambling statutes: (1) Nev. Rev. Stat. § 465.070(3), which prohibits taking anything of value "in or from a gambling game," and (2) Nev. Rev. Stat. § 465.083, which prohibits cheating, a lesser included offense.

The Manarites argue that the Nevada statutes require proof that the crime be committed *during the course of a game.* According to the Manarites, McLaughlin and"Peterson" said only that the chips were being taken off the tables. Therefore, they insist, the government failed to represent the chips as the proceeds of "specified unlawful activity."

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convictions would mandate reversal of any substantive convictions based *solely* on *Pinkerton* coconspirator liability. *See U.S. v. Castaneda,* 16 F.3d 1504 (9th Cir. 1994). Nonetheless, we find beyond a reasonable doubt that the jury in this case would have convicted the Manarites of the substantive counts based on principal or aider-and-abettor liability, with or without a *Pinkerton* charge. *See id.* at 1511. The evidence clearly shows that both Samuel and Jeanne Manarite directly participated in the substantive crimes of which they were convicted, money laundering and transportation and receipt of stolen property.

[10]The Manarites were convicted under two separate sections of the money laundering statute. The primary difference between them is that § 1956(a)(1) requires the money involved to be "in fact" the proceeds of unlawful activity, while § 1956(a)(3) is designed for government sting operations using money "represented to be" the proceeds of unlawful activity, but which is, in fact, government property.

We disagree. First, § 465.070(3) does not appear to require that the taking occur *during* a gambling game. The language is as follows:

It is unlawful for any person:

* * *

3. To claim, collect, or take . . . money or anything of value *in or from* a gambling game, with intent to defraud, without having made a wager contingent thereon, or to claim, collect or take an amount greater than the amount won.

Nev. Rev. Stat. § 465.070 (emphasis added).

Under the plain language of the statute, taking chips off a blackjack table constitutes taking "anything of value in or from a gambling game." A game need not be in progress.

Even were this not true, the evidence in the record, viewed in the light most favorable to the government, shows that McLaughlin and "Peterson" *did* represent chips to have been taken while blackjack games were in progress. Both described to the Manarites how the chips were being "skimmed" by the dealer, who was working with accomplices posing as players and paying them double on winning hands or paying out on losing hands.

2. Intent.

Money laundering under § 1956(a)(3) requires the government to prove that the Manarites conducted a financial transaction with the intent either (1) "to promote the carrying on of specified unlawful activity," 18 U.S.C. § 1956(a)(3)(A), or (2) "to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity," 18 U.S.C. § 1956(a)(3)(B). *See United States v. Montoya, 945* F.2d 1068, 1076 (9th Cir. 1991) (construing nearly identical intent requirements of 18 U.S.C. § 1956(a)(1)).

The Manarites argue that they lacked the required intent. Even if the chips were represented to be the proceeds of specified unlawful activity – they assert that the evidence showed that Samuel Manarite did not believe the representations. The government counters that lack of belief is irrelevant. It need only prove that the representations were made.[11]

We need not resolve this issue. Viewed in the light most favorable to the government, the evidence is such that a rational jury could find that Samuel Manarite did, in fact, believe McLaughlin's and "Peterson's" statements regarding the illegal source of the chips.

3. Requisite specific intent.

[9] The Manarites next contend that the government failed to prove the requisite specific intent, that is, that they intended either "to promote the carrying on" of the chip-skimming operation per (a)(3)(A) or "to conceal or disguise the nature, location, source, ownership, or control" of the skimmed chips per (a)(3)(B). Proof of *either* intent prong will support the Manarites' convictions. We find the evidence sufficient to prove both.

The Manarites, to refute the presence of an intent "to promote, etc.," rely heavily on *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991).[12] There the defendant, a preacher, deposited cash from his drug dealing into a church account that also contained legitimate church funds. 935 F.2d at 836. He later wrote

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[11]In the government's view, proof that the Manarites believed the chips to be illegally obtained is required only under § 1956(a)(3)(B). Presumably, the government's reasoning is that if a defendant has the intent to promote unlawful activity under (a)(3)(A), it can be inferred that she believes such activity is actually taking place. This issue has not yet been addressed by the courts, but the government's view, based on the plain language of the statute, is logical.

[12]*Jackson* involved a prosecution under § 1956(a)(1) rather than (a)(3), but the intent requirements are virtually identical.

checks on that account to purchase cellular telephone services, to pay his rent, and to obtain cash. *Id.* at 837.

The court found that the government had failed to prove that these transactions, which were wholly unrelated to the drug dealing, in any way promoted that illegal activity. *Id.* Judge Flaum described the "promote" prong as "aimed at . . . the practice of plowing back proceeds of 'specified unlawful activity' to promote the activity." *Id.* at 842.

The Manarites argue that intent"to promote the carrying on" of the illegal activity can *only* be found when the proceeds are "plowed back" into the activity. They argue that in their case, none of the cash was plowed back into the chip cashing scheme. Instead, the Manarites simply distributed the cash, pocketing their share.

We reject this view. In *United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991), a California state senator was convicted after an FBI sting operation in which he accepted a bribe in the form of a check from an undercover agent, which he deposited in his personal account. Montoya argued that depositing the check "could not have 'promoted' the unlawful activity, namely the bribe, because the activity had been completed upon receipt of the check from the undercover FBI Agent." *Id.* at 1076. We rejected this argument: "Montoya could not have made use of the funds without depositing the check. Moreover, depositing the check provided an opportunity for Montoya to carry out the illegal bribery by characterizing the funds as a legitimate honorarium." *Id.* We concluded that the evidence was sufficient for a jury to find that Montoya had deposited the check with the intent to promote the bribery.[13]

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[13]*Accord United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994) (holding that cashing embezzled IRS checks promoted "each preceding mail fraud by creating value out of an otherwise unremunerative enterprise"); *United States v. Cavalier*, 17 F.3d 90 (5th Cir. 1994) (holding that mail fraud was promoted when the false theft report caused

[10] The situation in *Montoya* is analogous to this case. The chip-skimming scheme could not benefit its participants unless the chips were cashed. A rational jury could conclude that the Manarites cashed the chips with the intent to promote the chip-skimming scheme. "Plowing back" of the gains into the enterprise is not necessary.

The Manarites also argue that the government failed to prove, as required by 1956(a)(3)(B), that they intended "to conceal or disguise the nature, source, location, ownership, or control" of the chips. This argument is meritless. It is clear from the record that the Manarites' actions were intended to disguise the fact that the chips had been skimmed from blackjack tables. The Manarites individually cashed the chips in small quantities, at different times and at different windows, sometimes even at different casinos. The fact that they did not wear disguises and were aware of being videotaped by surveillance cameras does not negate their intent to conceal. *United States v. Lovett,* 964 F.2d 1029, 1034 (lOth Cir.), *cert. denied,* 113 S. Ct. 169 (1992) (noting that there is "no requirement in the statute . . . that every money laundering conviction must be supported by evidence of intent to conceal the identity of the participants to the transaction"). It is enough that the Manarites sought to "conceal or disguise *in any manner* the nature, location, source, ownership or control" of the chips. *Id.* at 1034 n.3 (emphasis in original).

4. Cashing the chips constituted money laundering.

The Manarites also maintain that they only spent their chips, rather than laundering them. Their case, however, is unlike those on which they rely. *See, e.g., United States v. Garcia-Emanuel,* 14 F.3d 1469 (lOth Cir. 1994) (defendant used drug money to pay his mortgage, and to buy a horse, a trailer, and a watch); *United States v. Sanders,* 928 F.2d 940 (lOth Cir.), *cert. denied,* 112 S. Ct. 142 (1991) (defendant bought two cars with

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the insurer to send a check).

drug money). In those cases, the defendant engaged in ordinary commercial transactions with cash that happened to be the proceeds of drug dealing. The transactions were not "engaged in for the *purpose* of concealing assets," *Garcia-Emmanuel*, 14 F.3d at 1474 (emphasis in original); instead, they involved cash that had *already* been laundered and was being spent "for present personal benefit, and not to create the appearance of legitimate wealth." *Id.*

The Manarites were not simply "spending" the proceeds of the chip-skimming. Their argument ignores a fundamental step in realizing their gain. The Manarites had to cash the chips in order to reap the rewards of the scheme.

C. The Stolen Property Convictions.

[11] The Manarites, in what amounts to an attack on sting operations generally, argue that their convictions for transportation and receipt of stolen property cannot stand because the property was not in fact stolen.[14] They claim the government implicitly authorized them to take the government-owned property from the boat through Agent Matthews' aid and encouragement. The government's unsurprising position is that providing the opportunity to commit a burglary involving government-owned property does not mean that the government has consented to its taking. We find that the government has the better argument.

Nonetheless, the law cited by neither side is on point. The Manarites rely on cases which involved stolen property recovered by the police and then used in sting operations to apprehend those who buy and sell stolen property. E.g., *United States v. Dove*, 629 F.2d 325 (4th Cir. 1980). There is no question in this case about whether the property taken retained its stolen character. The

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[14]They also contest their convictions for money laundering under § 1956(a)(1), based on cashing the chips taken from the boat. Their argument is that the government failed to prove that the chips were "in fact" the proceeds of specified unlawful activity (i.e., the burglary) because they were technically not stolen.

property belonged to the government and the Manarites took it and then transported and disposed of it. The government cites authorities for various definitions of "stolen," all of which involve taking without the owner's consent. These cases miss the point. The issue is whether the government, by suggesting that its own property could be stolen and how the theft could be accomplished, has consented to the taking.

[12] We think not.[15] The Manarites seized the opportunity provided them by an undercover agent to commit a burglary, stealing government property in the process. It is true that the government tempted the Manarites with the prospect of gain from theft. But the FBI agent did not give them permission to take property from the "drug dealer's" boat or suggest that the drug dealer would permit it.

The morality of sting operations is troublesome. Deceit by officers of the law is employed for the purpose of securing arrests and convictions of persons they suspect have been engaged in wrongdoing for which there exists insufficient evidence to secure convictions or possibly even arrests. Deceit, however, is not always immoral. A comparison of the deceit of Shakespeare's Iago with that of Rostand's Cyrano makes that clear. It is the purpose of the deceiver on which the difference rests. Officers of the law who conduct a sting operation after having reason to suspect an individual of wrongdoing are not acting in an immoral manner. They are protecting society. The same cannot be said of officers who entrap their victims. To that issue we now turn.

D. Entrapment

[13] Jeanne Manarite argues that the trial court erred in refusing to submit an instruction on entrapment to the jury. We find that there is no evidence in the record that government agents

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[15]In cases involving "fences," courts have been careful to require that stolen property in fact be stolen because that is the heart of the crime; otherwise, the defendants would be guilty of nothing more than dealing in used goods.

induced her to commit any of the crimes with which she was charged.[16]

To be entitled to an entrapment defense, the defendant must present evidence that she was "(1) induced to commit the crime by a government agent and (2) not otherwise predisposed to commit the crime." *United States v. Kessee,* 992 F.2d 1001, 1003 (9th Cir. 1993). The defendant must present evidence of both elements, *Id.,* but the threshold is very low: "[O]nly *'slight* evidence is needed to create a factual issue and get the defense to the jury.'" *Id.* (quoting *United States v. Sotello-Murillo,* 887 F.2d 176, 179 (9th Cir. 1989)) (emphasis in original). Indeed, the "'evidence may be weak, insufficient, inconsistent, or of doubtful credibility.'" *Id.* (quoting *Sotello-Murillo,* 887 F.2d at 178). If the defendant makes such a showing, she is "entitled to an instruction unless the prosecution rebuts the evidence such that 'no rational jury could entertain a reasonable doubt as to either element.'" *Id.* (quoting *United States v. Hoyt,* 879 F.2d 505, 509 (9th Cir. 1989)).

[14] The primary flaw in Jeanne Manarite's argument is that the government agents' contact was almost exclusively with her husband. If any inducement occurred, it was Samuel Manarite, not Jeanne, who was induced. Samuel may have persuaded Jeanne to participate in the schemes to shield him from involvement because of his parole status. This Circuit, however, does not recognize the theory of "derivative entrapment." *United States v. Bonanno,* 852 F.2d 434, 439 (9th Cir. 1988), *cert. denied,* 488 U.S. 1016 (1989). Thus, "[i]nducement by a private party is not entrapment." *United States v. Emmert,* 829 F.2d 805, 808 (9th Cir. 1987).

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[16]This Circuit has not yet settled on the standard of review applicable to a district court's denial of a proposed jury instruction. In some cases, this court has reviewed the decision *de novo,* in others, for abuse of discretion. *United States v. LaFleur,* 971 F.2d 200, 204 (9th Cir. 1991), *cert. denied,* 113 S. Ct. 1292 (1993). We need not reach the issue, however, because under either standard, Jeanne Manarite was not entitled to an entrapment instruction.

[15] Nor is there any evidence of entrapment in Jeanne Manarite's contact with government agents. She was present at the meeting where the chip-cashing scheme was first discussed, but McLaughlin did not directly ask her or Samuel Manarite to cash the chips. He told them that "Peterson" and the dealer needed someone to cash the chips, and the Manarites volunteered. McLaughlin's actions did not rise to the level of inducement: "Mere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement." *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991). Inducement is government conduct that creates a substantial risk that an otherwise law-abiding person will commit a crime, including "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *United States v. Garzo-Juarez*, 992 F.2d 896, 909 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 724 (1994) (citations omitted). None of these circumstances existed in this case.

There is no evidence whatsoever that Jeanne Manarite was the victim of government entrapment. The trial court did not err in refusing the instruct the jury on the entrapment defense.

E. Admission of Prejudicial Evidence

Samuel Manarite argues that the trial court erred in admitting evidence of his parole status and of his paranoia about law enforcement scrutiny. He maintains that these references should have been excluded under Rules 404(b) and 403 of the Federal Rules of Evidence, because the government offered the evidence to show criminal propensity.[17] The government argues that the evidence was properly admitted to show that Manarite knew the schemes were illegal and to explain why he sent Jeanne and Robert Manarite to carry out some of the crimes. The explanation was

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[17]Manarite does not dispute that he was in fact on parole, or that he was fearful of police attention. *See United States v. Huddleston*, 485 U.S. 681 (1988) (Rule 404(b) evidence is relevant "if the jury can reasonably conclude that the act occurred and that the defendant was the actor").

that his parole status subjected him to police scrutiny and the risk of greater punishment if caught.

We review the district court's admission of Rule 404(b) evidence for an abuse of discretion; however, the determination that the evidence falls within the scope of the Rule is reviewed *de novo*. *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). Although there is no case law directly on point, we think it obvious that evidence of a defendant's parole status should be considered evidence of other crimes for purposes of Rule 404(b). *Cf. United States v. Hines*, 943 F.2d 348 (4th Cir.), *cert. denied*, 112 S. Ct. 613 (1991) ("revelations of the defendant's parole status might provoke a mistrial because it would inform the jury that the defendant had a prior criminal history").

[16] The evidence in the record shows that the trial court considered Manarite's objections, including the prejudice issue, in its ruling. The court entertained counsel's arguments and granted defense motions to redact two portions of the tape recordings. " 'tA] district court need not mechanically recite Rule 403's requirements before admitting evidence.' " *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990) (quoting *United States v. Thomas*, 893 F.2d 1066, 1071 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990)). Moreover, the trial court gave a limiting instruction to the jury. We find that the trial judge did not abuse his discretion in admitting the evidence regarding Manarite's parole status and his fear of law enforcement.

F. Severance

Jeanne Manarite contends that the trial court erred in not granting her motion to sever. Because she failed to renew her motion at the close of the evidence, however, she has waived the issue on appeal. *United States v. Restrepo*, 930 F.2d 705, 711 (9th Cir. 1991); *United States v. Smith*, 893 F.2d 1573, 1581 (9th Cir. 1990).

G. Sentencing

1. Failure to state reasons.

The trial court did not state its reasons for imposing the Manarites' sentences. Under 18 U.S.C. § 3553(c)(1), the court was required to make a "statement in open court of the reasons for choosing a sentence within the sentencing range if that range exceeds 24 months." *United States v. Upshaw, 918* F.2d 789, 792 (9th Cir. 1990), *cert. denied,* 499 U.S. 930 (1991).

[17] The government concedes that this court must remand the case so that the judge may explain his reasons. *See Id.* Accordingly, on remand the district court should make an adequate statement of reasons under § 3553(c)(1).

2. Factual disputes about the presentence reports.

The Manarites further contend that the district court failed to make findings about factual inaccuracies in their presentence reports, as required by Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure. The government argues that the Manarites' respective counsel withdrew their objections at the sentencing and therefore cannot raise them on appeal.[18] We find on the basis of the record that the Manarites waived their objections at the sentencing hearing. Accordingly, we decline to reach the merits.

3. Criminal history points for prior felonies.

Samuel Manarite argues that the trial court erred in assessing separate criminal history points for two prior felonies. He maintains that these felonies were "related" for purposes of

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[18]If the defendant does not raise any objection to the presentence report at the time of sentencing, then she waives the right to challenge it on appeal. *United States v. Visman, 919* F.2d 1390, 1394 (9th Cir. 1990), *cert. denied,* 112 S. Ct. 442 (1991). The government argues, and we agree, that withdrawal of an objection is tantamount to a waiver of an issue for appeal. *United States v. Montoya,* 782 F.2d 1554, 1556 (11th Cir. 1986).

U.S.S.G. § 4A1.2, and thus should have been assessed three criminal history points instead of six. His position is untenable.

Whether two cases are "related" under U.S.S.G. § 4A1.2 "is a mixed question of law and fact subject to *de novo* review." *United States v. Davis*, 922 F.2d 1385, 1388 (9th Cir. 1991). Prior cases are considered to be related if they "(1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." U.S.S.G. § 4A1.2(a)(2), Application Note 3.

The two prior felonies at issue were conspiracy to distribute obscene materials and extortion. Just before he was sentenced for the conspiracy charge, Manarite threatened one of his coconspirators for failing to repay a loan. The coconspirator told the FBI, which indicted Manarite for extortion. Manarite contends that the prior felonies were part of a common scheme or plan. The factors to be considered are

(1) whether the crimes were committed "within a short period of time;" (2) whether the crimes involved the same victim; (3) whether the defendant was arrested by the same law enforcement agency for both crimes; . . . (4) when the arrests occurred and whether both crimes were solved during the course of one investigation.... [and (5)] the similarities in the offenses.

United States v. Chapeick, 963 F.2d 224 (9th Cir. 1992) (quoting *Davis*, 922 F.2d at 1388).

We find that these two felonies were in no way part of a common scheme or plan. The loan was apparently unrelated to the obscene materials distribution ring. The two offenses are dissimilar in nature. The only possible nexus between them is that the coconspirator in one was the victim in the other. We affirm the trial court's assessment of separate criminal history points for the two crimes.

4. Leadership role.

Samuel Manarite next argues that the trial court erred in finding that he acted as a "leader" or a "manager" for purposes of U.S.S.G. § 3B1.1(c). This finding increased his Base Offense Level two levels. This court reviews the trial court's decision regarding the defendant's role in the offense for clear error. *United States v. Monroe*, 943 F.2d 1007, 1019 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1585 (1992). Under this standard, Manarite cannot prevail. The district court's finding is well supported by the evidence in the record.[19]

III.

CONCLUSION

We reverse the Manarites' convictions for conspiracy, vacate their sentences, and remand the case to the district court for resentencing to enable the district court to make a statement of reasons for its sentencing decisions as required by 18 U.S.C. § 3553(c)(1).

REVERSED in part and REMANDED.

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[19]She mere fact that the government agents may have played managerial roles in the criminal activity does nol help Manarite. Under the Guidelines, "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1, Application Note 4.

APPENDIX "B"

Entered and served August 9, 1993, Clerk, U.S. District Court, District of Nevada

UNITED STATES DISTRICT COURT
District of Nevada

UNITED STATES OF AMERICA

v.

JEANNE MANARITE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case No. CR-S-92-296-LDG-(LRH)

WILLIAM H. SMITH
Defendant's Attorney

THE DEFENDANT: JEANNE MANARITE

___pleaded guilty to count(s)_____
_X_ was found guilty on count(s) 1, 2, 3, 6, 7 & 8 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18/371	CONSPIRACY	6/22/92	1
18/1956 (a)(1) (A) & (i)&(2)	MONEY LAUNDERING, AIDING & ABETTING	6/22/92	2,3&8
18/2314 & 2	INTERSTATE TRANSPORTATION OF STOLEN PROPERTY & ABETTING	6/22/92	6
18/2315 & 2	RECEIPT OF STOLEN PROPERTY AIDING & ABETTING	6/22/92	7

The defendant is sentenced in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 4 & 5.
__ Count(s) _____(is)(are) dismissed on the motion of the United States.
X It is ordered that the defendant shall pay a special assessment of $300.00 for count(s) 1, 2, 3, 6, 7 & 8 of the Superseding Indictment which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 012-14-4940

Defendant's Date of Birth: 10/21/20

Defendant's Mailing Address:
CLARK COUNTY DETENTION CENTER
LAS VEGAS, NEVADA

Defendants Residence Address:
SAME

JULY 23, 1993, Date of Imposition of Sentence

/s/ Ronald S. W. Lew
Signature of Judicial Officer
RONALD S. W. LEW, U.S. DISTRICT JUDGE
Name & Title of Judical Officer

August 4, 1993
Date

(2)

No. 94-1641

FILED
JUN 5 - 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEANNE MANARITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for money laundering under 18 U.S.C. 1956(a)(3)(A) and (B).

2. Whether petitioner was entitled to a jury instruction on the defense of derivative entrapment.

3. Whether the evidence was sufficient to support petitioner's conviction for receiving stolen property, in violation of 18 U.S.C. 2315.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 44 F.3d 1407.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1995. A petition for rehearing was denied, and the opinion was amended, on March 15, 1995. The petition for a writ of certiorari was filed on April 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on two counts of money laundering (Counts 2 and 3), in violation of 18 U.S.C. 1956(a)(3)(A) and (B), and one additional count of money laundering (Count 8), in violation of 18 U.S.C. 1956(a)(1)(B)(i); one count of transporting stolen property in interstate commerce (Count 6), in violation of 18 U.S.C. 2314; one count of receiving stolen property (Count 7), in violation of 18 U.S.C. 2315; and one count of conspiring to commit those and other offenses (Count 1), in violation of 18 U.S.C. 371. Judgment at 1. She was sentenced to 46 months' imprisonment, to be followed by a three-year term of supervised release. *Id.* at 2-3. The court of appeals reversed petitioner's conspiracy conviction, affirmed her other convictions, vacated her sentence, and remanded for resentencing. Pet. App. A1-A24.

1. The FBI suspected that petitioner's husband, Samuel Manarite, was involved in criminal activity, and an FBI informant, Richard McLaughlin, "set out to 'get close'" to him. Pet. App. A3; see Gov't C.A. Br. 4. Samuel Manarite suggested to McLaughlin that they should "earn some money together." Pet. App. A3. Based on their previous conversations, McLaughlin understood that suggestion to pertain to illegal activity. Gov't C.A. Br. 4. McLaughlin said that he knew someone at a casino, and Samuel Manarite suggested that they could make as much as $500,000 by engaging in fraudulent credit transactions at casinos. *Id.* at 4-5.

Petitioner and Samuel Manarite met with McLaughlin, and later also met with an FBI agent,

William Matthews, who was posing as an employee of the Maxim Casino in Las Vegas, Nevada. Gov't C.A. Br. 4, 5. McLaughlin said that Agent Matthews knew a blackjack dealer who was skimming chips from the casino, and that they needed a way to convert the chips into cash. *Id.* at 5-6. Petitioner and Samuel Manarite suggested several ways to cash the chips, and they agreed to do so for half of the profits. *Id.* at 6.

On March 19, March 20, March 27, and April 1, 1992, McLaughlin gave petitioner a total of $13,000 in chips, which she and her family cashed at the casino. Gov't C.A. Br. 6-8. Samuel Manarite then gave McLaughlin his share of the cash. *Ibid.* McLaughlin asked Samuel Manarite whether he wanted to stop the scheme. Samuel Manarite responded that he did not, and he repeatedly pressed McLaughlin to provide more chips. *Ibid.* On April 9 and April 15, 1992, Agent Matthews met with Samuel Manarite and gave him a total of $5,050 in chips. *Id.* at 8-9. Samuel Manarite again complained at the lack of chips; he told Agent Matthews to pressure the blackjack dealer into skimming more chips. *Id.* at 9.

On April 20, Agent Matthews told Samuel Manarite that the dealer had stopped skimming chips. Gov't C.A. Br. 9. The two discussed fraudulent credit transactions and the possibility of burglarizing hotel rooms at the Maxim Casino. *Ibid.* On May 16, 1992, petitioner's son, Robert Manarite, and Robert's friend, Sandra Bonham, submitted a false credit application to the casino, borrowed $5,000 in chips, and left the casino with the chips. *Id.* at 10. Samuel Manarite cashed some of the chips, and petitioner distributed the cash proceeds. *Ibid.*

On June 2, 1992, Agent Matthews told Samuel Manarite that he (Matthews) was involved in money laundering for a drug dealer, and that the drug dealer kept large amounts of cash on a boat in Marina Del Rey, California. Gov't C.A. Br. 11. Samuel Manarite asked Agent Matthews whether he wanted him to burglarize the boat, and Matthews said it was his decision, but then said he would rather not have him take the chance of being caught. *Ibid.* The Manarites decided to burglarize the boat, and on June 9, petitioner and her son, Robert, met McLaughlin in Marina Del Rey. *Id.* at 12. McLaughlin showed them where the boat would be docked. *Ibid.* The next day, Robert Manarite went onto the boat and took $18,300 in cash and chips, and three pieces of jewelry that had been planted there by the FBI. *Ibid.* The Manarites cashed the chips from the burglary and divided the money among themselves. *Id.* at 12-13.

2. Neither petitioner nor her husband presented any evidence at trial. Gov't C.A. Br. 2. Petitioner proposed an instruction on direct entrapment, which stated that when "a person, having no previous intention to violate the law, is talked into committing a crime by government agents, she is entrapped, and the law, as a matter of policy, forbids her conviction." C.A. Supp. E.R. 58. The court found that there was no evidence that would warrant instructing the jury on that theory. Gov't C.A. Br. 3. Samuel Manarite did not request an instruction on entrapment. See Samuel Manarite C.A. Br. 17. Petitioner did not request an instruction on derivative entrapment.

3. The court of appeals reversed petitioner's conspiracy conviction, and remanded for resentencing. Pet. App. A1-A24. Count 1 of the indictment alleged that petitioner conspired to commit several offenses,

including mail fraud and wire fraud. The court held that the mail fraud and wire fraud objects were legally insufficient to constitute federal offenses. Because the jury returned a general verdict of guilty, the court reversed the conspiracy conviction, explaining that the jury might have relied on one of the legally invalid objects in finding petitioner guilty of the conspiracy. Pet. App. A5-A11.

The court affirmed petitioner's money laundering convictions on Counts 2 and 3 based on her cashing of the stolen casino chips. Pet. App. A12-A17. The court rejected petitioner's argument that she lacked the intent "to promote the carrying on of specified unlawful activity," as required by 18 U.S.C. 1956(a)(3)(A), because that intent can "*only* be found when the proceeds are 'plowed back' [reinvested] into the activity." Pet. App. A15. The court noted that "[t]he chip-skimming scheme could not benefit its participants unless the chips were cashed," and, accordingly, "[a] rational jury could conclude that the Manarites cashed the chips with the intent to promote the chip-skimming scheme." *Id.* at A16.

The court rejected petitioner's entrapment argument for the same reasons as the district court, finding that "[t]here is no evidence whatsoever that [petitioner] was the victim of government entrapment." Pet. App. A20. The court noted that "[i]f any inducement occurred, it was Samuel Manarite, not [petitioner], who was induced," but that even if Samuel persuaded petitioner to participate in the schemes, the Ninth Circuit does not recognize a defense of "derivative entrapment." *Id.* at A19. In any event, the court concluded, the evidence established that petitioner and her husband "volunteered" to commit the crime when they were given the

opportunity, and therefore they did not receive any government "inducement"—*i.e.*, the type of government conduct "that creates a substantial risk that an otherwise law-abiding person will commit a crime." *Id.* at A20.

Finally, the court rejected petitioner's claim that she could not be convicted of transporting or receiving stolen property, because the government "implicitly authorized" her "to take the government-owned property from the boat through Agent Matthews' aid and encouragement." Pet. App. A17. Recognizing that petitioner's claim "amounts to an attack on sting operations generally," the court found that "[t]he property belonged to the government and the Manarites took it and then transported and disposed of it" without the government's permission. *Id.* at A17-A18. The court indicated that petitioner's broader challenge, to the "morality of [the] sting operation[]" in this case, was in effect a restatement of her failed entrapment claim. *Id.* at A18.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that this Court should grant review to resolve a conflict in the courts of appeals over the interpretation of the money laundering statute, 18 U.S.C. 1956(a)(3)(A). A violation of Section 1956(a)(3)(A) requires proof that the defendant conducted a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, with the intent "to promote the carrying on of [the] specified unlawful activity." Petitioner contends that the decision below, which held that a financial transaction may "promote" an unlawful activity even if its proceeds are not reinvested in the activity, conflicts with

decisions of the Seventh and Fourth Circuits. That claim does not warrant review.[1]

In *United States* v. *Jackson*, 935 F.2d 832 (7th Cir. 1991), the defendant deposited the proceeds of drug dealing into a church's bank accounts, and then used money from the accounts to buy pagers, mobile telephones, and automobiles, and to pay his rent. *Id.* at 836-837, 841. The government charged that those purchases violated 18 U.S.C. 1956(a)(1)(A)(i), which requires the defendant to engage in a financial transaction "with the intent to promote the carrying on of specified unlawful activity."[2] The court held that the purchase of the pagers "was intended to promote [the defendant's drug] activity, establishing a violation of § 1956(a)(1)(A)(i)," but that the other purchases, and the payment of rent, were intended only to "maintain[]" the defendant's comfortable "lifestyle," not his drug dealing, and therefore did not establish a money laundering violation under Section 1956(a)(1)(A)(i). 935 F.2d at 841.

As the Third Circuit recognized in *United States* v. *Paramo*, 998 F.2d 1212, 1217 (1993), cert. denied, 114 S. Ct. 1076 (1994), "*Jackson* stands for the proposition

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[1] This Court recently denied review in a case raising the identical claim, *Brown* v. *United States*, cert. denied, 115 S. Ct. 1404 (1995) (No. 94-7445).

[2] As the court below explained (Pet. App. A12 n.10), Section 1956(a)(1)(A)(i) is similar to Section 1956(a)(3)(A): "The primary difference between them is that § 1956(a)(1) requires the money involved to be 'in fact' the proceeds of unlawful activity, while § 1956(a)(3) is designed for government sting operations using money 'represented to be' the proceeds of unlawful activity, but which is, in fact, government property." In particular, as the court noted (Pet. App. A13), the two provisions have "nearly identical intent requirements."

that an intent to promote the carrying on of unlawful activity cannot be inferred from the mere fact that a defendant uses cash proceeds of such activity to pay personal expenses or purchase consumer goods." Where the financial transaction is conducted as part of the defendant's illegal scheme, however, *Jackson* does not shield the activity from prosecution. Because *Jackson* does not "suggest an intention either to delineate the universe of conduct prohibited under section 1956(a)(1)(A)(i), or to decide whether a defendant could violate that section other than by plowing back the proceeds of unlawful activity," that decision "cannot fairly be read to imply that a conviction under section 1956(a)(1)(A)(i) necessarily requires evidence that the defendant plowed back, or reinvested, criminal proceeds." *Paramo*, 998 F.2d at 1218; accord *United States* v. *Piervinanzi*, 23 F.3d 670, 682 (2d Cir.), cert. denied, 115 S. Ct. 259, 267 (1994).[3]

Petitioner derives no greater support from her reliance (Pet. 10-11) on *United States* v. *Heaps*, 39 F.3d 479 (4th Cir. 1994). *Heaps* reversed a money laundering conviction because "[t]here was no evidence that the money acquired through the payment [at issue] was itself used to promote an

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[3] As petitioner points out (Pet. 9), the court in *Jackson* stated that Section 1956(a)(1)(A)(i) is "aimed" at "the practice of plowing back proceeds of 'specified unlawful activity' to promote that activity." 935 F.2d at 842. That statement, however, was merely an attempt to contrast an obvious application of Section 1956(a)(1)(A)(i) with the scope of Section 1956(a)(1)(B)(i), which applies to financial transactions designed to "conceal" the attributes of laundered funds. The statement does not amount to a holding that a transaction can never "promote" illegal activity in the absence of "plowing back." See *Paramo*, 998 F.2d at 1218.

unlawful activity." *Id.* at 486. The court noted that "the only evidence as to what was done with the money after it was sent [to the defendant in payment for drugs] was that it was put in a box in a drawer of the defendant's house." *Ibid.* The court concluded that the statute "should not be interpreted to make any drug transaction a money laundering crime." *Ibid.* It also stated that its interpretation was "squarely consistent" with the rationale of *Jackson*, and indicated that "[t]o the extent" its decision was inconsistent with the views of the Third and Ninth Circuits, it would not apply those decisions. *Ibid.*

It is unclear whether the court in *Heaps* intended to adopt a "plowing back" theory. In any event, any disagreement among the courts of appeals on that issue is not squarely presented here. Unlike *Heaps*, this case did not involve a single transfer of funds, in which there was no proof of further transactions or intention to encourage them. 39 F.3d at 484. Rather, as noted above, petitioner engaged in a continuing fraudulent scheme. Moreover, the financial transactions in this case—cashing the chips—were not only designed to "promote" the carrying on of the illegal chip-skimming, they were integral to its success, because the chips themselves have no intrinsic value outside the casino. As the court of appeals explained (Pet. App. A16), "[t]he chip-skimming scheme could not benefit its participants unless the chips were cashed." Thus, petitioner's financial transactions were intended to promote the carrying on of the unlawful activity; *Heaps* does not suggest that the Fourth Circuit would reach a contrary result in this case.

2. Petitioner also contends (Pet. 12-16) that the district court erred in refusing to instruct the jury

on the defense of derivative entrapment, and that this Court should grant review to resolve a circuit conflict over the existence of that defense. The court below correctly rejected petitioner's claim of entrapment. No further review is warranted.

Entrapment is an affirmative defense that is implicated only when law enforcement officials "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932). Thus, "the entrapment defense has two parts: (1) the government's 'inducement' of criminal behavior; (2) by a defendant who was not 'predisposed' to commit the crime." *United States* v. *Gendron*, 18 F.3d 955, 960 (1st Cir.) (Breyer, J.), cert. denied, 115 S. Ct. 654 (1994); see also *Jacobson* v. *United States*, 112 S. Ct. 1535, 1540 (1992); *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973).

In keeping with those principles, the courts of appeals have uniformly recognized that "[t]here is no defense of private entrapment." *United States* v. *Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc); see also *Russell*, 411 U.S. at 433. Thus, the law does not "permit an innocent minded defendant to raise an entrapment claim when a *private* person 'induced' him (through * * * 'overreaching' conduct) to commit a crime * * *, however 'outrageous' the private person's conduct" may have been. *Gendron*, 18 F.3d at 962-963.[4] The vast majority of the courts of

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[4] See, *e.g.*, *United States* v. *Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992), cert. denied, 113 S. Ct. 1824, 3019 (1993); *United States* v. *Robins*, 978 F.2d 881, 884-885 (5th Cir. 1992); *United States* v. *Pilarinos*, 864 F.2d 253, 256 (2d Cir. 1988);

appeals have applied that principle in cases of so-called "derivative entrapment"—*i.e.*, when the private person who induces the defendant's commission of the crime was himself entrapped or otherwise subject to improper pressures by government agents. See, *e.g.*, *United States* v. *Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992), cert. denied, 113 S. Ct. 1824, 3019 (1993); *United States* v. *Sarmiento*, 786 F.2d 665, 667-668 (5th Cir. 1986); *United States* v. *Stewart*, 770 F.2d 825, 831 (9th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *Leroux*, 738 F.2d 943, 948 (8th Cir. 1984). The reason for disallowing such a defense is that if an individual is willing to break the law when persuaded to do so by a private party, he should not escape liability simply because the government may have acted improperly toward that other party. *Hollingsworth*, 27 F.3d at 1218 (Ripple, J., dissenting).

Petitioner claims (Pet. 12-16) that the lower courts are divided on the validity of "derivative entrapment" as a defense, with the Second and Seventh Circuits endorsing that defense. In the Second Circuit, a defendant is entitled to a jury instruction on that defense when the government directly transmits an inducement to him, or "consciously recruit[s]" him,

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United States v. *Bradley*, 820 F.2d 3, 7-9 (1st Cir. 1987); *United States* v. *Sarmiento*, 786 F.2d 665, 667-668 (5th Cir. 1986); *United States* v. *Stewart*, 770 F.2d 825, 831 (9th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *McLernon*, 746 F.2d 1098, 1109 (6th Cir. 1984); *United States* v. *Leroux*, 738 F.2d 943, 948 (8th Cir. 1984); *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983) (per curiam); *United States* v. *Mers*, 701 F.2d 1321, 1340 (11th Cir.), cert. denied, 464 U.S. 991 (1983); *United States* v. *Dove*, 629 F.2d 325, 329 (4th Cir. 1980); *United States* v. *Burkley*, 591 F.2d 903, 911 n.15 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979).

through a third party. *United States* v. *Toner*, 728 F.2d 115, 127 (2d Cir. 1984); see *United States* v. *Pilarinos*, 864 F.2d 253, 256 (2d Cir. 1988). Thus, to establish the defense in the Second Circuit, a defendant generally must show that the third party is being used as a cat's paw for an investigation that is directed at the defendant himself.[5] In *Hollingsworth*, the Seventh Circuit appeared to adopt that standard, holding that "when a private individual, himself entrapped, acts as agent or conduit for governmental efforts at entrapment, the government as principal is bound." 27 F.3d at 1204.

That articulation of the "derivative entrapment" defense accords with the principle, accepted by all of the courts of appeals and by this Court, that entrapment may exist where a third party, who is not a law-enforcement officer, purposefully acts as an agent of the government in transmitting inducements to the defendant. See, *e.g.*, *Sherman* v. *United States*, 356 U.S. 369, 373-374 (1958) (defendant entrapped by

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[5] Petitioner relies (Pet. 13-14) on the Second Circuit's decision in *United States* v. *Valencia*, 645 F.2d 1158 (1980) (*Valencia I*), which appeared to endorse a broader theory of derivative entrapment. *Id.* at 1168; see *id.* at 1176-1179 (Van Graafeiland, J., dissenting from denial of rehearing en banc in *Valencia I*). Since *Valencia I*, however, the Second Circuit has substantially "retrenched" from the implications of that decision. *Hollingsworth*, 27 F.3d at 1204; see *id.* at 1218 (Ripple, J., dissenting) ("the Second Circuit's decision in [*Valencia I*] has been placed in doubt by the subsequent caselaw of that circuit"); *Pilarinos*, 864 F.2d at 256; *Toner*, 728 F.2d at 126-127; see also *United States* v. *Valencia*, 677 F.2d 191, 192 (2d Cir. 1982) (*Valencia II*).

government informant).[6] Some courts use the "derivative entrapment" rubric to describe those agency cases, see, *e.g.*, *Hollingsworth*, 27 F.3d at 1204; *Pilarinos*, 864 F.2d at 256, while other courts reject that label while still recognizing the availability of entrapment as a defense in such circumstances, see, *e.g.*, *United States* v. *Bradley*, 820 F.2d 3, 7 n.6 (1st Cir. 1987). Whatever name courts attach to the defense, however, it depends on a finding of agency between the government and the third party who communicated the inducement to the defendant.

The application of agency principles to the entrapment context has produced only one narrow disagreement among the courts of appeals. The Second and Seventh Circuits hold that an "unwitting middleman"—*i.e.*, an innocent third party who does not know of the government's focus on the defendant —may be deemed a government agent for purposes of entrapment law when the government purposefully uses the middleman to induce the defendant to commit a crime. See *Pilarinos*, 864 F.2d at 256; *Hollingsworth*, 27 F.3d at 1204. In contrast, the Fifth and Ninth Circuits have held that such a middleman generally is not a government agent. See *Sarmiento*, 786 F.2d at 667-668; *United States* v. *Emmert*, 829 F.2d 805, 808-809 (9th Cir. 1987).[7]

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[6] See also *Hollingsworth*, 27 F.3d at 1204-1205; *Robins*, 978 F.2d at 884-885; *Bradley*, 820 F.2d at 7-8; *Sarmiento*, 786 F.2d at 667-668; *McLernon*, 746 F.2d at 1109; *Mers*, 701 F.2d at 1340; *United States* v. *Garcia*, 546 F.2d 613, 615-616 (5th Cir.), cert. denied, 430 U.S. 958 (1977).

[7] Petitioner also claims (Pet. 14) that the D.C. Circuit allows the derivative defense, and she relies for that claim on *Johnson* v. *United States*, 317 F.2d 127 (1963). In *Johnson*, however, the middleman was a knowing participant in the government's

That narrow disagreement is not implicated by the facts of this case for three reasons. First, petitioner is presenting her claim of derivative entrapment for the first time in this Court. She did not request a derivative entrapment instruction in the district court; she requested only a direct entrapment instruction. See C.A. Supp. E.R. 55-59. Nor did she present her derivative entrapment claim to the court of appeals. See Pet. C.A. Br. 14-18; Pet. C.A. Rep. Br. 7-10. While the court of appeals alluded to the doctrine, it did so only to reject her direct entrapment claim—by pointing out that petitioner was brought into the crime by her husband, if by anyone. Pet. App. A19. Thus, petitioner cannot now argue that the district court erred in refusing to give a derivative entrapment instruction. See, *e.g.*, *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984).

Second, petitioner has not articulated a legally valid entrapment claim under the law of any circuit. Petitioner does not suggest that her husband was a government agent under ordinary agency principles (see Pet. i), and both courts below concluded that there was no evidence that petitioner was entrapped by any government agent. See Pet. App. A19-A20. Nor does petitioner assert that the government "consciously recruited" her through her husband. At

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contact with the defendant. See *id.* at 128. In *United States* v. *Mayo*, 498 F.2d 713 (1974), the D.C. Circuit cited *Johnson* for the proposition that entrapment exists where "a private citizen" acts "as an agent" of the government, and held that "where there is no showing that the agent provocateur was purposefully acting on behalf of the Government the defense does not obtain." *Id.* at 716-717.

most, she suggests that the government entrapped her husband, and that he passed on the inducement to her of his own accord. See Pet. 12. As the Second Circuit has repeatedly held, a defendant is not entitled to an entrapment instruction where a government agent entraps a middleman, "and the middleman, responding to the pressure upon him, takes it upon himself to induce" the defendant to commit a crime. *Pilarinos*, 864 F.2d at 256; see *Toner*, 728 F.2d at 127; see also *Hollingsworth*, 27 F.3d at 1204.

Third, there was no evidence of entrapment of any defendant, including petitioner's husband, in this case. The court of appeals correctly concluded that "McLaughlin's actions did not rise to the level of inducement," and that, far from being entrapped, petitioner and her husband both "volunteered" to cash the stolen chips. Pet. App. A20. Because there was no evidence to support the claim that petitioner was entrapped, whether directly or derivatively, that claim would fail under even the most generous articulation of the entrapment defense.

3. Petitioner contends (Pet. 16-18) that the property taken from the boat in Marina Del Rey was not "stolen" property under 18 U.S.C. 2315 because the government authorized the defendants to take it. As the court of appeals concluded (Pet. App A18), however, the government "did not give [petitioner] permission to take property from the * * * boat." Nor is petitioner assisted (Pet. 17) by *United States* v. *Dove*, 629 F.2d 325 (4th Cir. 1980). As the court of appeals explained, in contrast to *Dove*, "[t]here is no question in this case about whether the property taken retained its stolen character." Pet. App. A17.

Petitioner also claims that the government encouraged her to steal the property, and that there is a "dearth of law" (Pet. 18) on the question of when such encouragement precludes a conviction under Section 2315. In fact, as the court of appeals correctly held, petitioner would not be entitled to relief on her theory of governmental encouragement unless she could demonstrate entrapment, which she failed to do. See Pet. App. A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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